BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

VOYTEK CHWILKA
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-478
Case No. 93-00728

S.S.A. No.

MONTEREY COUNTY D.A.
(Respondent)
Family Support Division

Employer Account No. N/A

Office of Appeals No. SJ-CSI-01831

The Employment Development Department (EDD) appealed from the decision of the administrative law judge which held that child support arrearage should not be withheld from the claimant's benefits under section 1255.7 of the Unemployment Insurance Code.

STATEMENT OF FACTS

On September 25, 1992 EDD mailed the claimant a "Notice Of Child Support Intercept." This notice advised the claimant that EDD had been notified by the Department of Social Services (DSS) that the claimant had an arrearage of child support payments. Therefore, pursuant to California Unemployment Insurance Code section 1255.7 and Welfare and Institutions Code section 11350.5, an amount not to exceed 25% of the claimant's unemployment insurance benefits would be deducted from his benefits beginning September 6, 1992 and continuing until the child support obligation was met. The amounts thus withheld would be forwarded to DSS. The notice also advised the claimant that the decision was final unless he filed an appeal with the California Unemployment Insurance Appeals Board within twenty days of the date of the notice. The notice stated the appeal would be limited to the issue of whether DSS instructed EDD to deduct the amount deducted.

The claimant filed a timely appeal. He alleged that on December 12, 1991 a court in San Mateo County ordered that payroll deductions from the claimant's wages for child support cease because the claimant had been awarded physical custody of his children.

As a result to the claimant's appeal, the San Jose Office of Appeals mailed a Notice of Hearing for an October 22, 1992 hearing to the claimant and the Monterey County district attorney. EDD was also aware of the appeal and hearing.

In anticipation of the hearing, EDD solicited a declaration from the Monterey County District Attorney's Office. On October 14, 1992, prior to the date of the hearing, a deputy district attorney submitted a declaration under penalty of perjury certifying that the claimant had an unmet court-ordered child support obligation. The deputy did not submit a summary of the arrearage or a certified copy of a court order with the declaration. This declaration was included as an exhibit in the hearing record.

Only the claimant appeared at the hearing. The claimant testified that no arrearage existed or had ever existed.

REASONS FOR DECISION

The first issue we address is the scope of the ALJ's jurisdiction, on an appeal from EDD's determination, to reduce an individual's unemployment compensation payments under the child support intercept program. In the present case, the claimant contends that an arrearage is not owed.

Section 11350.5 of the Welfare and Institutions Code provides, in part:

> "(a) As authorized by subdivision (d) of Section 704.120 of the Code of Civil Procedure, the following actions shall be taken in order to enforce support obligations which are not being met. Whenever a support judgment or order has been rendered by a court of this state against an individual who is entitled to any unemployment compensation benefits. . .the district attorney may file a certification of support judgment or support order with the State Department of Social Services, verifying under penalty of perjury that there is or has been a judgment or an order

for support with sums overdue thereunder. The department shall periodically present and keep current by deletions and additions, a list of the certified support judgments and orders and shall periodically notify the Employment Development Department of individuals certified as owing support obligations.

****

"(c) Notwithstanding any other provision of law, the Employment Development Department shall withhold the amounts specified below from the unemployment compensation benefits. . .of individuals with unmet support obligations. The Employment Development Department shall periodically forward them to the State Department of Social Services for distribution to the appropriate certifying county. (Emphasis added)

****

"(e) The amounts withheld in subdivisions (c) and (d) shall be equal to 25 percent of each weekly unemployment compensation benefit payment. . .rounded to the nearest whole dollar, which is due the individual identified on the certified list. However, the amount withheld may be reduced to a lower whole dollar amount through a written agreement between the individual and district attorney's office or through an order of the court. (Emphasis added)

"(f) The State Department of Social Services shall ensure that the appropriate certifying county shall resolve any claims for refunds in the amounts over withheld by the Employment Development Department.

"(g) No later than the time of the first withholding, the individuals who are subject to the withholding shall be notified by the payer of benefits of all of the following:

"(1) That his or her unemployment compensation benefits or unemployment compensation disability benefits have been reduced by a court-ordered child support judgment or order pursuant to this section.

"(2) The address and phone number of the district attorney's office which submitted the certificate of support judgment or order.

"(h) The individual may ask the appropriate court for an equitable division of the individual's unemployment compensation. . .withheld to take into account the needs of

all the persons the individual is required to support. (Emphasis added)

****

"(j) For purposes of this section, 'support obligations' means the child and related spousal support obligations which are being enforced pursuant to a plan described in Section 454 of the Social Security Act and as that section may hereafter be amended. However, to the extent 'related spousal support obligation' may not be collected from unemployment compensation under federal law, those obligations shall not be included in the definition of support obligations under this section."

The language of section 1255.7 of the Unemployment Insurance Code is correlative to the provisions of Welfare and Institutions Code section 11350.5. Together these two code sections are commonly referred to as the child support intercept program. EDD's authority to withhold up to 25% of a claimant's unemployment benefits to satisfy unmet court-ordered child support arrearage is established under these two code sections.

Section 15 is one of the general provisions of the Unemployment Insurance Code that governs the construction of the code. It states that "'shall' is mandatory and 'may' is permissive."

While the unemployment insurance law provides for appeals from adverse EDD determinations, we are persuaded by the mandatory language of section 1255.7 of the Unemployment Insurance Code that this Board and its administrative law judges lack authority to determine whether or not an arrearage is owed, the reasonableness or fairness of the amount withheld, or the accuracy of the amount withheld. If a claimant disagrees he or she must attempt to negotiate an agreement with the appropriate district attorney's office or seek to adjust the amount through a court order. Also, the Welfare and Institutions Code, section 11350.5 (e), supra, confers upon the district attorney of the certifying county the authority to resolve claims for refunds on amounts which have been over withheld.

The remaining issue in the present case is whether the district attorney met its burden of proof that the claimant had an unmet child support obligation.

The claimant testified that he had no arrearage. His testimony was based on his contention that a court had enjoined a payroll deduction for child support from the claimant's wages. The claimant did not provide a certified copy or other evidence of the court order at the hearing. The district attorney certified in a declaration under penalty of perjury that the claimant had an unmet court-ordered child support obligation.

In Precedent Decisions P-B-218, P-B-293 and P-B-378 the Appeals Board followed the legal principle that testimony given at the hearing and subject to cross-examination is generally entitled to greater weight than hearsay statements, whether or not such statements are in affidavit form. In Precedent Decision P-B-57, however, the Board recognized that sworn, direct testimony may be disbelieved where it appears unreliable, contradictory, or inherently improbable.

While we generally afford greater weight to testimony given under oath than to hearsay statements, whether or not in the form of a declaration, under the circumstances of this case, we find the declaration by the district attorney inherently more reliable than the claimant's testimony. The claimant's testimony was based on alleged facts asserted in a court document which was not provided at the hearing.

The district attorney is an officer of the court and in executing the declaration acted in his official capacity. We presume that the district attorney acted in accordance with Welfare and Institutions Code section 11350.5(a). Although we would have preferred that the district attorney also provide a certified copy of the court order or agreement or accompany the declaration with a summary of the payment/arrearage records, we find nothing unreliable in the district attorney's declaration albeit, hearsay in nature.

In so finding, we deviate from the general rule that testimony given under oath is entitled to greater weight than hearsay testimony. In cases involving the child support intercept program, we find the affidavit of the district attorney certifying that a claimant owes an arrearage is entitled to greater weight than the claimant's testimony to the contrary. We do not address the issue of whether or not EDD's assertions at a hearing that a claimant owes an arrearage will be entitled to greater weight than the claimant's sworn testimony.

Accordingly, we conclude that the claimant's benefits shall be subject to reduction as provided by code section 1255.7.

Although this appeal arises as a result of a reduction in the claimant's unemployment insurance benefits, we note that section 2630 of the UIC corresponds to section 1255.7 of the code in authorizing the interception of disability benefits under Part 2 of the code. The foregoing considerations apply also to a reduction in disability benefits for unmet child-support obligations in accordance with that section of the code.

DECISION

The Decision of the administrative law judge is reversed. The claimant's benefits are subject to reduction in accordance with code section 1255.7 as determined by EDD.

Sacramento, California, January 20, 1994.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

LOUIS WM. BARNETT (Concurring - opinion attached)

DEBRA A. BERG

GEORGE E. MEESE

JAMES S. STOCKDALE

INGRID C. AZVEDO

TOM BANE

I concur in the decision of my colleagues.

The legislature has seen fit to limit the jurisdiction of this Board and its administrative law judges when considering an appeal from a notice of a child support intercept. This limitation is part of a statutory scheme that appropriately compels a claimant who seeks to reduce the amount of benefits being intercepted to apply to the Superior Court for an order or to enter into an agreement with the district attorney of the certifying county for such a reduced intercept.

Thus, the proper scope of inquiry in such cases is whether a preponderance of the evidence establishes that a county district attorney has certified to EDD that the claimant has an unmet child support obligation. Obviously this Board's jurisdiction also extends to insuring that the amount of the intercept does not exceed 25 percent of the weekly benefit amount, absent a court order or agreement reducing its further

LOUIS WM. BARNETT

FURTHER APPEAL INFORMATION

Section 410 of the California Unemployment Insurance Code provides:

> "A decision of the appeals board is final, except for such action as may be taken by a judicial tribunal as permitted or required by law."

The Attorney General has ruled that under this section of the code the Appeals Board cannot review, rehear, reconsider, or set aside its decision. (37 Ops. Cal. Atty. Gen. 133) Therefore, the Board may not act upon a request to reopen the appeal and reconsider the enclosed decision.

Decisions of this Board are reviewable in Superior Court by way of a Petition for Writ of Mandate pursuant to section 1094.5 of the Code of Civil Procedure. Any action to obtain a court review of the decision must be initiated by you. The Appeals Board does not process petitions for court review. Such petitions must be filed with the court not later than six months after the date of the decision of the Appeals Board.

Claimants who are recipients of adverse decisions and who intend to seek a writ of mandate are reminded that it is extremely important to continue to file your weekly claim for benefits at the appropriate Employment Development Department office for each week that you contend you are eligible. If you eventually prevail in a court action, the Department can pay you only for those weeks for which you have filed a regular weekly claim and met the other tests of eligibility.